98

(2)

No. 07-1504

FILED
JUL - 3 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

SCOT HOLLONBECK, et al.,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, THE LEGAL CENTER FOR PEOPLE WITH DISABILITIES, DISABILITY RIGHTS LEGAL CENTER, AMERICAN ASSOCIATION OF ADAPTED SPORTS PROGRAMS, WOMEN'S SPORTS FOUNDATION, RAFAEL IBARRA, KARIN KORB, TOM PETRANOFF, AND PUBLIC JUSTICE CENTER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SAMUEL R. BAGENSTOS*
625 South State Street
Ann Arbor, MI 48109
(734) 764-1358

*Counsel of Record

GREGORY P. CARE
Francis D. Murnaghan, Jr. Appellate Advocacy Fellow
PUBLIC JUSTICE CENTER
One North Charles Street
Suite 200
Baltimore, MD 21201
(410) 625-9409

Counsel for Amici Curiae

CKLF LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interests of the *Amici Curiae*	1
Summary of Argument	6
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985) 6

DeFrantz v. U.S. Olympic Cmte., 492 F. Supp. 1181 (D.D.C. 1980) 13

Maass v. Higgins, 312 U.S. 443 (1941) 14

San Francisco Arts & Athletics, Inc. v. U.S. Olympic Cmte., 483 U.S. 522 (1987) 14

STATUTES

36 U.S.C. § 220502 (2004) 12

36 U.S.C. § 220503 (2004) 7, 10, 12

36 U.S.C. § 220505 (2004) 12

OTHER AUTHORITIES

Americans with Disabilities Act of 1988: Hearing Before the Senate Committee on Labor and Human Resources, 100th Cong., 2d Sess. 15 (Sept. 27, 1988) 11

Australian Paralympic Committee, *APC Programs*, http://www.paralympic.com.au/About APC/APCPrograms/tabid/328/Default.aspx 10

British Swimming and the ASA, *World Class Programmes*, http://www.britishswimming.org/vsite/vcontent/page/custom/0,8510,5157-181895-199113-42421-268578-custom-item,00.html 9

TABLE OF AUTHORITIES – Continued

Page

CAROLE A. OGLESBY & DOREEN L. GREENBERG, ENCYCLOPEDIA OF WOMEN AND SPORT IN AMERICA (1998) 13

Denise M. Anderson, et al., *Adolescent Girls' Involvement in Disability Sport: A Comparison of Social Support Mechanisms*, 40 J. LEISURE RES. 183 (2008) 13

International Olympic Committee, *Athens 2004 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2004 8

International Olympic Committee, *Atlanta 1996 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=1996 8

International Olympic Committee, *Salt Lake City 2002 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2002 8

International Olympic Committee, *Sydney 2000 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2000 8

International Olympic Committee, *Turin 2006 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2006 8

International Paralympic Committee, *Medal Standings Athens 2004 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2004PG 9

TABLE OF AUTHORITIES – Continued

Page

International Paralympic Committee, *Medal Standings Atlanta 1996 Paralympic Games*, http://www.paralympic.org/results/reports/medal_standings2pdf.php?sport_id=all&games_id=1996PG 8

International Paralympic Committee, *Medal Standings Salt Lake City 2002 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2002PG 9

International Paralympic Committee, *Medal Standings Sydney 2000 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2000PG 9

International Paralympic Committee, *Medal Standings Torino 2006 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2006PG 9

Josh Pate, *Extremity Games*, ABILITY MAGAZINE, Jan. 1, 2007 11

PHILIP A. KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999) 13

SELECT COMMITTEE ON PUBLIC ACCOUNTS, REPORT, 2006, H.C. 898, *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/898/89805.htm 10

TABLE OF AUTHORITIES – Continued

Page

SPORT CANADA, ATHLETE ASSISTANCE PROGRAM POLICIES AND PROCEDURES (2005), *at* http://www.canadianheritage.gc.ca/progs/sc/pol/athlete05/aap_e.pdf 10

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are disability, civil rights, and sports equity organizations, as well as former members of the United States Olympic and Paralympic Teams. *Amici* submit this brief because of their concern that the U.S. Court of Appeals for the Tenth Circuit's ruling blesses second-class treatment of Paralympic athletes and could have a broad-ranging and harmful impact on the rights of individuals with disabilities in federally funded programs generally. Under the Tenth Circuit's analysis, the participation of individuals with disabilities in those programs is essentially a matter of charity, and recipients of federal funding have no obligation to provide those individuals equal access. Because the Tenth Circuit's ruling rested on a profound misreading of the law – and the message sent by the United States Olympic Committee's separate-and-unequal policy has broad-ranging consequences – *amici* have an especially strong interest in participating in this case. *Amici* are:

---

[1] *Amici Curiae* have obtained the written consent of Petitioners Scot Hollonbeck, et al., as well as the written consent of Respondent United States Olympic Committee to file this brief with the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* note that counsel for *Amici* wrote the entirety of this brief and that no person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

The **National Federation of the Blind (NFB)** is the leading national organization of blind persons, with affiliates in all 50 states, the District of Columbia and Puerto Rico. Most of its approximately 50,000 members are blind. NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. NFB promotes the general welfare of the blind by (1) assisting the blind to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life.

The **Disability Rights Education and Defense Fund, Inc. (DREDF)**, based in Berkeley, California, is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Disability Rights Advocates (DRA) is a nonprofit public interest law firm that specializes in class action civil rights litigation on behalf of persons with disabilities throughout the United States. Based in Berkeley, California, DRA strives to protect the civil and human rights of people with disabilities throughout the United States and worldwide. DRA works to

end discrimination in areas such as access to public accommodations and services, employment, transportation, education, housing and health care.

The **Center for Legal Advocacy, d.b.a. The Legal Center for People with Disabilities and Older People (The Legal Center)**, is a Colorado non-profit corporation established to protect and promote the legal and human rights of persons with disabilities. It serves as Colorado's federally-mandated Protection and Advocacy System to advocate on behalf of the rights of individuals with disabilities. *See* 29 U.S.C. § 794e *et seq.*; 42 U.S.C. § 10801 *et seq.*; *id.* § 15043. Toward that end, The Legal Center has provided assistance to more than 16,000 persons with disabilities over the past three decades.

The **Disability Rights Legal Center (DRLC)** is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), Individual with Disabilities Education Improvement Act (IDEA), and other federal and state laws.

The **American Association of Adapted Sports Programs (AAASP)** is a non-profit membership organization consisting of adapted athletic programs residing within public school systems. Its sports serve student-athletes in grades 1 to 12 who have a physical or visual impairment. These athletes are not eligible for Special Olympics since they are not intellectually challenged and more closely resemble adult athletes participating in the Paralympic Games. AAASP works in partnership with education agencies in the United States to establish programs, policies, procedures and regulations in interscholastic adapted sports for students with disabilities in order to enhance educational outcomes and promote healthy lifestyles. In Georgia, the organization's "model state", AAASP serves as the governing and sanctioning body for these programs having established a dual governance alliance with the Georgia High School Association in 2001. Increasingly, AAASP is called upon to consult with state high school associations across the United States seeking to implement programs compliant with Section 504 of the Rehabilitation Act by establishing reasonable accommodations for their students with disabilities who increasingly have sought to be a part of athletics at school, both through the addition of athletic programs designed specifically for their abilities and, where appropriate, inclusively with their non-disabled peers on traditional teams.

The **Women's Sports Foundation** is a non-profit educational organization dedicated to ensuring equal participation and leadership opportunities for

girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports.

Rafael Ibarra represented the United States at the Seoul Paralympics in 1988, where he won the gold medal in the 800-meter and bronze medals in both the 4 x 100-meter relay and the marathon. He is currently preparing to compete for a place on the United States handcycling team in the Beijing Paralympics in 2008.

Karin Korb represented the United States in wheelchair tennis at the Sydney Paralympics in 2000 and the Athens Paralympics in 2004.

Tom Petranoff represented the United States at the Los Angeles Olympics in 1984 where he competed in the javelin throw. He previously held two world records in that event. He has coached for the South African Paralympic Team and has associated with many able-bodied athletes and athletes with disabilities at the elite level of sports.

The **Public Justice Center (PJC)** is a nonprofit civil rights and poverty law organization founded in 1985, with a longstanding commitment to promoting equality for all persons. One of several

arenas in which the PJC has actively pursued equality is between individuals who are able-bodied and those with disabilities. The PJC's Appellate Advocacy Project has submitted or joined in briefs of *amicus curiae* in recent cases involving claims by individuals with disabilities faced with discrimination by public institutions. *See, e.g.*, *Biggs v. Bd. of Educ. of Cecil County*, Docket No. 02-1318 (4th Cir. 2002); *Amos v. Md. Dep't of Pub. Safety & Corr. Servs.*, 205 F.3d 687 (4th Cir. 2000); *Terry v. Grasmick*, 114 F.3d 1177 (4th Cir. 1997).

SUMMARY OF ARGUMENT

Amici agree with Petitioners' argument that this Court should grant *certiorari* to review the Tenth Circuit's manifestly erroneous interpretation of the Rehabilitation Act. That interpretation, which permitted the United States Olympic Committee (USOC) effectively to write itself out of the Rehabilitation Act's nondiscrimination requirements by defining the off-the-field support it provides to Olympic and Paralympic athletes as separate programs, directly conflicts with this Court's precedents. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (stating that "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled"). That holding encourages recipients of federal funding to create separate, second-class programs for people with disabilities, a result

that directly conflicts with the letter and spirit of the Rehabilitation Act.

Amici do not seek to repeat the arguments made by Petitioners; instead, we seek to emphasize two distinct points that highlight the need for this Court's review. First, the USOC's own justification for giving less generous support to Paralympic athletes – that Olympic athletes have a greater need for that support to stay competitive – simply does not hold water, and smacks of the paternalism and stereotyping that has long denied opportunities to people with disabilities. In fact, the United States Paralympic team, unlike the United States Olympic team, has fallen behind its competitor nations in recent years because of the USOC's inequitable allocation of support. Second, given the leadership position the USOC occupies, and the shadow its decisions cast over other amateur athletic organizations, this case is exceptionally important. This Court's review is essential to vindicate the application of the disability discrimination laws in an area of great public prominence.

ARGUMENT

1. In the Tenth Circuit, the USOC justified its refusal to provide equal support to Olympic and Paralympic athletes on the ground that "Congress's command to attract 'the most competitive amateur representation'" required the disparity. USOC C.A. Br. 6 (quoting 36 U.S.C. § 220503(4)). The USOC

argued, in particular, that U.S. Paralympic athletes have been far more successful than U.S. Olympic athletes in recent years, and that Olympic athletes therefore needed greater support to stay competitive. *Id.*

But in fact, the U.S. Olympic team has performed extremely strongly vis-à-vis its competitors in recent years, while the U.S. Paralympic team has lost ground. The United States has earned the highest medal count in each of the last three Summer Olympics, and it has placed second in the medal count in each of the last two Winter Olympics.[2] By contrast, although the United States led the medal count in both the 1996 Summer and 2002 Winter Paralympics, it fell to third place in the 2000 Summer Games and then regressed to fourth in the most recent Summer Paralympics (2004) and seventh in the most recent Winter Paralympics (2006).[3] There is every reason to

---

[2] International Olympic Committee, *Salt Lake City 2002 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2002 (last visited June 19, 2008); International Olympic Committee, *Turin 2006 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=2&OLGY=2006 (last visited June 19, 2008); International Olympic Committee, *Atlanta 1996 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT-1&OLGY=1996; International Olympic Committee, *Sydney 2000 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2000 (last visited June 19, 2008); International Olympic Committee, *Athens 2004 Medal Table*, http://www.olympic.org/uk/games/past/table_uk.asp?OLGT=1&OLGY=2004 (last visited June 19, 2008).

[3] *Compare* International Paralympic Committee, *Medal Standings Atlanta 1996 Paralympic Games*, http://www.paralympic.

(Continued on following page)

believe that the USOC's policy of treating Paralympic athletes as separate and unequal has played a role in that decline.

During this period of decline by the United States Paralympic Team, rival nations such as Canada, Australia, and Great Britain implemented more equitable support for Paralympians and began to surpass the United States in medal counts and gold medals earned. These nations, which have often expressly integrated their Olympic and Paralympic teams,[4] provide essentially equal support to Olympic

---

org/results/reports/medal_standings2pdf.php?sport_id=all&games_id=1996PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Salt Lake City 2002 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2002PG (last visited June 19, 2008), *with* International Paralympic Committee, *Medal Standings Sydney 2000 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2000PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Athens 2004 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2004PG (last visited June 19, 2008), *and* International Paralympic Committee, *Medal Standings Torino 2006 Paralympic Games*, http://www.paralympic.org/release/Main_Sections_Menu/Sports/Results/paralympics_reports.html?type=medalstandings&games=2006PG (last visited June 19, 2008).

[4] For example, the national governing body, British Swimming, coordinates and controls *all* of Great Britain's swimmers on one team, whether Olympian or Paralympian. British Swimming and the ASA, *World Class Programmes*, http://www.britishswimming.org/vsite/vcontent/page/custom/0,8510,5157-18

(Continued on following page)

and Paralympic athletes.[5] Contrary to the USOC's assertion below, its inequitable treatment of Paralympic athletes appears to have impeded achievement of the USOC's mission to "obtain for the United States . . . the most competent amateur representation possible in each event of the Olympic [and] the Paralympic Games. . . ." 36 U.S.C. § 220503(4) (2004).

But *amici* do not point out the apparently harmful competitive effects of the USOC's separate-and-unequal policy merely out of concern that the USOC is failing in its statutory mission and harming the standing of American amateur athletics. Rather, *amici* point this out because the USOC's excuse for

---

1895-199113-42421-268578-custom-item,00.html (last visited June 20, 2008) (stating that British Swimming coordinates both Olympic and Paralympic athletes). In the United States, by contrast, there exist two separate teams in swimming sports, one for (the able-bodied) Olympians and another for (people with disabilities) Paralympians.

[5] *See, e.g.*, SPORT CANADA, ATHLETE ASSISTANCE PROGRAM POLICIES AND PROCEDURES 1-1, 5-1 through 5-2 (2005), *at* http://www.canadianheritage.gc.ca/progs/sc/pol/athlete05/aap_e.pdf (stating that grants made through the Canadian Athlete Assistance Program are awarded to Olympic and Paralympic athletes in equal amounts); SELECT COMMITTEE ON PUBLIC ACCOUNTS, REPORT, 2006, H.C. 898, *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/898/89805.htm (indicating that Great Britain has made a similar equitable investment into its Olympic and Paralympic athletes in near equal measure with its World Class Performance Programme); Australian Paralympic Committee, *APC Programs*, http://www.paralympic.com.au/AboutAPC/APCPrograms/tabid/328/Default.aspx (last visited June 21, 2008).

separate-and-unequal treatment – that athletes with disabilities do not really need support, because their events are not really competitive anyway, and that resources would be better directed to nondisabled athletes – smacks of "the excuses and the veneer of good intentions" that have long been employed to deny opportunities to people with disabilities. *Americans with Disabilities Act of 1988: Hearing Before the Senate Committee on Labor and Human Resources*, 100th Cong., 2d Sess. 15 (Sept. 27, 1988) (statement of Rep. Coelho). As here, the excuses typically do not hold up under scrutiny. The disability rights *Amici* are concerned that the Tenth Circuit's holding blesses precisely the sort of conduct that Congress enacted the disability discrimination laws to prohibit. And the athletic *Amici* are concerned that the USOC's discriminatory policy exacts a personal toll on athletes with disabilities who participate in sport partly to escape the notion that they are inferior to nondisabled individuals. Josh Pate, *Extremity Games*, ABILITY MAGAZINE, Jan. 1, 2007, at 26 (summarizing how several extreme athletes with disabilities have come to feel more confident and equal to nondisabled athletes through sports designed for people with disabilities). This Court's review is essential to make clear that the Rehabilitation Act serves to protect individuals with disabilities against the paternalistic stereotypes that have long denied them opportunity – not least in the important context of high-level amateur sport.

2. The USOC is *the* federally-chartered corporation charged with "*exclusive jurisdiction* . . . over all matters pertaining to United States participation in the . . . Paralympic Games . . . including representation of the United States in the games." 36 U.S.C. §§ 220502(a), 220503(3)(A) (2004) (emphasis added). With that authority, the USOC is granted the power to "organize, finance, and control the representation of the United States in the competitions and events of . . . the Paralympic Games . . . and obtain, directly or by delegation to the appropriate national governing body, amateur representation for those games." 36 U.S.C. § 220505(c)(3) (2004). Accordingly, the USOC is the only entity capable of creating policies affecting Paralympians in the United States, making it the only possible defendant in a suit brought by a plaintiff seeking to challenge those policies. Further, because the USOC is not divided into separate entities on a state or individual sport level, but rather is a singular corporate body, suits challenging the USOC's policies are unlikely to arise in jurisdictions across the country.

As *the* national organization charged with supervision of elite amateur sports in the United States, the USOC's policies and actions are granted great weight by the national governing bodies of particular sports and other organizations associated with the USOC. Moreover, the nation as a whole looks towards the USOC as the voice of amateur athletics and accepts its positions as a model to emulate. The actions of the USOC send – and are often intended to

send – a social message. *See DeFrantz v. U.S. Olympic Cmte.*, 492 F. Supp. 1181 (D.D.C. 1980) (discussing the USOC's decision to boycott the 1980 Moscow Games in protest over the Soviet Union's invasion and occupation of Afghanistan). Unfortunately, the USOC is sending a strong, negative message to Americans and the world by its discriminatory policies regarding Paralympians.

The Olympics and Paralympics are a source of national pride and of aspirational role models. There can be no doubt of the impact on the American psyche of the performance of Jesse Owens at the 1936 Olympics in Hitler's Germany[6] or Wilma Rudolph at the 1960 Olympics.[7] Those athletes helped to change cultural perceptions of groups that had been stigmatized and subjected to discrimination. When the USOC persists in its disparate treatment of Paralympians, it encourages and entrenches the second-class status of people with disabilities in American society, and it deprives young Americans with disabilities of important role models. *Cf.* Denise M. Anderson, et al., *Adolescent Girls' Involvement in Disability Sport: A Comparison of Social Support Mechanisms*, 40 J. LEISURE RES. 183 (2008) (finding that young girls with disabilities who had positive athlete role models who also have a disability were

---

[6] PHILIP A. KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 139 (1999).

[7] CAROLE A. OGLESBY & DOREEN L. GREENBERG, ENCYCLOPEDIA OF WOMEN AND SPORT IN AMERICA 104 (1998).

more likely to become active in athletics and view themselves, and be viewed by their able-bodied peers, as "normal").

This case is exceptionally important given the leadership position the USOC occupies, and the shadow its decisions cast over other amateur athletic organizations and society at large. In the past, this Court has recognized the importance of the USOC by granting *certiorari* even *absent* a conflict in the circuits. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Cmte.*, 483 U.S. 522, 528 (1987); *see also Maass v. Higgins*, 312 U.S. 443, 445 (1941) (granting a writ of certiorari without a circuit conflict because of the importance of the issue presented). In light of the conflict the Tenth Circuit's decision created with decisions of the Eighth and Ninth Circuits, Pet. for Cert. 28-33, this Court's review is especially warranted.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

SAMUEL R. BAGENSTOS*
625 South State Street
Ann Arbor, MI 48109
(734)764-1358

GREGORY P. CARE
Francis D. Murnaghan, Jr. Appellate Advocacy Fellow
PUBLIC JUSTICE CENTER
One North Charles Street
Suite 200
Baltimore, MD 21201
(410) 625-9409

**Counsel of Record*

Counsel for Amici Curiae